IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.01.2007

CORAM:

THE HONOURABLE MR.JUSTICE P.JYOTHIMANI

C.R.P.PD.No.731 of 2002

Krishnamoorthy ... Petitioner(2nd Petitioner)

Vs.

1. Parasuraman
2. Yashoda
3. Chinnapappa
4. Jayalakshmi
5. Saroja

... Respondents

PRAYER : Civil Revision Petition filed under Section 115 of CPC against the order and decreetal the file of Principal District Munsif, Ulundurpet in I.A.No.79 of 2001 in O.S.No.2 of 1995 dated 05.03.2001.

For Petitioner : Mr.V.Raghavachari
For Respondents : Mr.Girish Kumar for
Mr.T.Gandhi for R2 & R3

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O R D E R

The second plaintiff in the suit is the revision petitioner, which is filed under Section 115 of Code of Civil Procedure. The revision arises from the order passed by the learned Trial Judge in dismissing the application filed by the petitioner under Section 5 of the limitation Act for condoning the delay of 95 days in filing a petition to restore the suit dismissed on 17.08.2000.

2. The case of the plaintiff is that the first plaintiff being a mortgager in a mortgage deed executed by him in favour of the first defendant Parasuraman, has filed the suit for redemption in the District Munsif Court, Tirukovilur against the defendants 1 to 6 in O.S.No.430 of 1982 and after the trial, the trial court has passed a preliminary decree on 11.04.1984. The appeal filed against the said preliminary decree by the second and third defendants in A.S.No.144 of 1984, was also dismissed on 04.08.1986. It was there after, the first plaintiff filed I.A.No.668 of 1988 in O.S.No.430 of 1982 for

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passing final decree. In the mean time, since the first plaintiff parasuraman died, an application to condone delay, as well as to set aside abatement was filed by the second plaintiff along with the petition to implead him as a legal heir and ultimately, the petitions were allowed. As against the said orders, the defendants 1 to 3 have approached this Court by filing C.R.P.Nos.647 to 649 of 1993 and this Court by an order dated 13.11.2000 has dismissed the revisions. In the mean time the suit in O.S.No.430 of 1982 on the file of the District Munsif Court, Thirukovilur was transferred to the Principal District Munsif Court, Ulundurpet and was renumbered as O.S.No.2 of 1995.

3. However, the final decree petition came to be dismissed by the Trial Court on 17.08.2000 on the basis that the petitioner was unable to produce the order from the High Court, after the High Court dismissed the C.R.P. as stated above on 13.11.2000. The petitioner has met his counsel at Madras and it was only after receiving the same on 18.12.2000 from the counsel at Madras, the petitioner came to know about the dismissal of the revision. The petition to restore the final decree application filed by the petitioner in I.A.No.79 of 2001 in O.S.No.2 of 1995, which should have been filed within 30 days, was filed after the delay of 95 days and it was to condone the said delay of 95 days, the application was filed under Section 5 of the Limitation Act and the Trial Court has dismissed the application against which the present revision is filed before this Court.

4. The order of the learned Trial Judge is assailed by the plaintiff on the basis that the facts of the case would show that cogent reason has been given by the plaintiffs for the purpose of explaining delay especially in the circumstance that admittedly, the revision petition filed by the respondents have been pending before this Court and the same have been dismissed on 13.11.2000 and it is his case it came to the knowledge of the petitioner only on 18.12.2000, when he went to Madras to see the counsel and therefore, the delay has been explained properly.

5. It is also the case of the petitioner that in fact the revision petitioner/second plaintiff has examined himself as a witness to explain about the reason for the delay. It is his case that when the above revisions were filed in respect of the order setting aside the abatement by defendants 1 to 3, there was in fact, an order of allowing of the revision by the High Court, since on the respondents side in the High Court who were the plaintiffs in the suit there was no appearance and therefore, the C.R.P. was originally allowed on 13.02.1998 and the petitioner admittedly has not chosen to produce any order or suspending the said order but ultimately, the High Court has dismissed the revisions on 17.08.2000. The Trial Court presumed as if, the petitioner was aware on the same date about the dismissal of the C.R.P. and has not chosen to file the

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application to restore the final decree application.

6. According to the learned counsel for the petitioner, when admittedly, the High Court has ultimately dismissed the revision in C.R.P.No.647 to 649 of 1993, filed by the defendants 1 to 3 on 13.11.2000, it is only confirming the order of the Lower Court that the abatement of the suit was set aside and therefore, in the interest of justice, the application for condonation of delay ought to have been accepted, especially, when it is the petitioner's cogent case in evidence that the factum of the dismissal of the revision came to his knowledge, only after he met the counsel at Madras on 18.12.2000.

7. The learned counsel would rely upon the judgement of the Hon'ble Apex Court rendered in 1998(7) SCC 123 (N.Balakrishnan Vs. M.Krishnamurthy) to substantiate his contention that while considering the application under Section 5 of the Limitation Act, for condonation of delay, even though it is discretionary, it is not the length of delay which matters but acceptability of explanation is the only criteria.

8. On the other hand, the learned counsel for the respondents would contend that the first respondent, who was the first defendant died on 23.06.2002 and therefore, the revision petitioner has not taken any steps. While meeting the said contention, the learned counsel for the petitioner Mr.V.Raghavachari, would submit that when once preliminary decree in a suit has been passed, thereafter, order 22 Rule 3 and 4 of Code of Civil Procedure has no application. He would also rely upon the judgement of the Hon'ble Supreme Court in AIR 1958 SC 706 to contend that if all the legal representatives are brought on record and some are not served, there was no question of abatement of suit or appeal, if the application under Order 22 Rule 4 is not served. He would also rely upon the judgement of the Patna High Court rendered in AIR 1962 PATNA 178 to substantiate his contention wherein in a case of suit for partition, after the preliminary decree was passed Order 22 Rule 3 and 4 have no application in case of the death of the parties and the same is governed by Rule 10 Order 22.

9. On the other hand, the learned counsel for the respondents would submit that the plaintiffs have not explained the delay of 95 days in filing the application to restore the final decree petition and therefore, the Trial Court is correct in the decision.

10. I have heard the learned counsel for the petitioner as also the learned counsel for the respondents and perused the entire records.

11. A reference to the entire record show that it is admitted

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fact that the High Court has dismissed the revision filed in C.R.P.No.647 to 649 of 1993 by defendants 1 to 3 upholding the setting aside of the abatement order and also impleading the parties. The question to be considered in this case is that while defendants 1 to 3 was filed the said revisions before this Court, originally this Court has allowed the revision on 13.02.1998, since the respondents in the revision namely the plaintiffs herein have not appeared. It was thereafter on application to set aside the said order, the same appears to have been allowed by this Court and ultimately this Court in the above C.R.Ps. has dismissed the same on 30.11.2000, which remains an indisputed fact. While so, the question relating to the abatement of suit has come to an end.

12. But, on the other hand, the Trial Court has dismissed the final decree application on 17.08.2000 itself on the basis that originally the above said revisions filed by defendants 1 to 3, were allowed in the absence of the respondents therein, which order was of course subsequently set aside. On this said facts and circumstances, it is only fair and natural that subsequently when this Court has dismissed the revisions on 13.11.2000 about which according to the plaintiff he came to know only on 18.12.2000 and immediately, thereafter he filed the petition, in my considered view, the reasoning given by the learned Trial Judge in stating as if 95 days delay has not been properly explained, is uncalled for. After the admitted dismissal of the revisions on 13.11.2000, it was the duty of the Trial court to consider the date for the purpose of deciding the application to restore the final decree petition.

13. Therefore, on the face of it, I do not think that the reasoning given by the learned Trial Judge in dismissing the application for restoration of final decree proceeding is proper. It is in this regard as rightly pointed by the learned counsel for the petitioner necessary to consider the decision of the Hon'ble Apex Court in framing certain guidelines regarding the discretion to be exercised in the court in condoning the delay in N.Balakrishnan Vs. M.Krishnamurthy reported in 1998(7) SCC 123 holding that it is the primary function of the court to adjudicate the dispute between the parties to advance substantial justice and the rule of limitation are not meant to destroy the rights of parties, since the same is founded on the principles of public policy. The relevant portion of the judgement of the Hon'ble Apex Court in this regard

> "11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damages caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the

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efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time."

14. In view of the above said facts, I do not think that it is necessary to deal with the judgements referred to by the learned counsel for the petitioner in respect of the Order 22 Rule 3, 4 and 10 of the Code of Civil Procedure. In view of the same the revision petition stands allowed and the order of the learned Trial Judge dated 05.03.2001 passed in I.A.No.79 of 2001 in O.S.No.2 of 1995 is set aside with a direction to the Trial Court to restore the final decree petition filed by the plaintiff in I.A.No.79 of 2001 in O.S.No.2 of 1995 and pass appropriate final judgement and decree after following the procedure within a period of 6 months from the date of receipt of the copy of this order and report the same to this Court. No Costs.

nbj

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

TO

1. THE PRINCIPAL DISTRICT MUNSIF, ULUNDURPET.

2. THE SUB ASST. REGISTRAR,
JUDICIAL DEPT, HIGH COURT, MADRAS
[For watching the Report]

1 CC TO MR.V. RAGHAVACHARI, ADVOCATE SR 2194
1 CC TO MR.T. GANDHI, ADVOCATE SR 1876

Predelivery order in
C.R.P.PD.No.731 of 2002

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